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SERVICE DATE - JULY 10, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 41849

AMERICAN IMPORTS, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF BE-MAC TRANSPORT COMPANY, INC.

Decided: July 5, 2000

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, in Be-Mac Transport Company, Inc. v. American Imports, Inc., Adv. No. 95-4115. The court proceeding was instituted by Be-Mac Transport Company, Inc. (Be-Mac or respondent),[1] a former motor common and contract carrier, to collect undercharges from American Imports, Inc. (American or petitioner). Be-Mac seeks undercharges of $52,282.54 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 41 shipments of items such as toys, games, sponge balls and rubber bands between February 16, 1990, and June 2, 1992. The shipments were transported from petitioner's facilities in San Antonio, TX, to points in Illinois, Ohio, Pennsylvania and Michigan. By order dated May 20, 1996, the court directed petitioner to initiate administrative proceedings before the Board for determination of the applicable issues raised and administratively closed the proceeding.[2]

Pursuant to the court order, American, on June 28, 1996, filed a petition for declaratory order requesting the Board to resolve all disputed issues within its primary jurisdiction. By decision served July 8, 1996, the Board issued a procedural schedule. On September 20, 1996, American filed its opening statement. Be-Mac filed its statement of facts and argument on October 21, 1996. Petitioner did not submit a statement in rebuttal.

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[1] On January 22, 1993, Be-Mac filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code, in the United States Bankruptcy court for the Eastern District of Missouri, Eastern Division, Case No. 93-40022-293.

[2] The court retained exclusive jurisdiction over the proceeding for further action as necessary.

Petitioner asserts that respondent's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a) and that the rates respondent now seeks to collect are unreasonable. Petitioner maintains that the freight charges originally billed by Be-Mac and paid by American were rates mutually agreed upon by the parties, and that American relied on the agreed-upon rates in tendering its traffic to Be-Mac to the exclusion of services provided by other carriers.

American supports its argument with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner who conducted an audit and analysis of the balance due bills and claims of respondent. Mr. Bange states that respondent originally assessed flat charges for most of the shipments at issue,[3] with one shipment billed at a class rate to which a 55% discount was applied. He asserts that corrected freight bills issued on behalf of respondent disallowed the originally assessed charges and re-rated the shipments on the basis of full undiscounted bureau published class rates or applicable bureau rates to which percentage discounts were applied. According to Mr. Bange, the corrected freight bills resulted in charges that in most instances were more than double the amounts originally billed by respondent.

Attached as Exhibit B to Mr. Bange's affidavit are copies of the "balance due" bills issued on behalf of respondent that reflect originally issued freight bill data as well as "corrected" balance due amounts. An examination of the balance due bills indicates initially assessed charges based on flat rates and a single shipment assessed a rate to which a 55% discount was applied. The balance due bills set forth newly assessed charges, substantially higher than the charges originally assessed, based on undiscounted bureau class rates or bureau rates to which discounts of 35%, 50%, or 55% were applied. Mr. Bange also attaches as Exhibit D a list of flat charges dated September 26, 1991, proposed by respondent to be applied to petitioner's shipments.[4] Mr. Bange maintains that Be-Mac offered discounted freight rates in the form of flat charges and percentage reductions off class rates to American that were not properly or timely filed, that petitioner relied upon the offered rates in tendering its traffic to respondent, that the charges originally billed by respondent were paid by petitioner, and that the efforts of Be-Mac to collect undercharges from American constitute an unreasonable practice.

Respondent maintains that the rates and charges initially assessed were not authorized by an applicable filed tariff in effect at the time the shipments at issue were transported, and that the rates it now seeks to collect have not been shown to be unreasonable. Be-Mac further asserts that petitioner has provided no evidence that the originally assessed charges were negotiated.

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[3] The flat charges applied ranged from $450.00 to $1,450.00 per shipment.

[4] The flat charges ranged from $500.00 to $1,700.00 per shipment.

Be-Mac supports its argument with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI).[5] Mr. Swezey states that he was unable to verify any of the originally assessed charges in an applicable filed tariff. Shipments were re-rated at applicable bureau class rates from tariff ICC ECA 532 and tariff ICC MWB 550, with discounts applied per tariff ICC BMTC 600-D, Item 11400, and signed discount agreements dated November 15, 1988, and August 29, 1990, negotiated by the parties.[6] Mr. Swezey asserts that the corrected freight charges based on tariff rates are applicable and have not been shown to be unreasonable.

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.[7]

Section 13711(a) provides, in pertinent part, that "It shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to [the jurisdiction of the Board] . . . to attempt to charge or to charge for a transportation service the difference between (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) the negotiated rate for such transportation service if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this section."

It is undisputed that Be-Mac no longer transports property.[8] Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

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[5] CSI is the auditor authorized by the court to provide rate audit and collection services for respondent.

[6] Copies of the negotiated agreements are attached as Appendix B to Mr. Swezey's statement.

[7] Typically, a court hearing undercharge cases will direct the shipper to bring to the Board all defenses that have been raised in court; as a result, in addition to section 13711 issues, petitioners before the Board typically raise issues of contract carriage, rate applicability and rate reasonableness. When it is able to resolve a case fully on section 13711 grounds, however, the Board does not address those other more complex issues. See, e.g., Rhinelander Paper Company v. The Bankruptcy Estate of Murphy Motor Freight Lines, Inc., No. 40837 (STB served Oct. 23, 1997). We will not address the other more complex issues raised here because our section 13711 findings fully resolve the question of petitioner's liability for the rates sought.

[8] See Bange's affidavit Exhibit C at 4.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 13711(a) determination. Section 13711(f) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed and for which there is written evidence of such agreement." Thus, section 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains copies of the "balance due" bills issued on behalf of respondent that indicate initially assessed charges based on flat rates and a class rate to which a 55% discount was applied that are significantly less than the charges respondent is here seeking to collect. In addition, the record contains a proposal by respondent dated September 26, 1991, listing flat charges to be assessed that generally correspond to the flat charges originally billed for the shipments at issue. We find this evidence sufficient to satisfy the written evidence requirement. E. A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E.A. Miller).[9] See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (mem.) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

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[9] Be-Mac, at pp. 4-5 of its statement filed October 21, 1996, argues that freight bills do not constitute written evidence. Respondent asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision of section 13711(f) superfluous because the Board, under section 13711(b)(2)(D), must independently consider whether the carrier submitted and collected freight bills reflecting the unfiled agreed-upon rate.

The ICC and the Board have consistently rejected this argument. Section 13711(b)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier" There is no requirement under this provision that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in a pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 13711(b)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 13711(f). Defendant's argument might be more persuasive if the written evidence requirement was a "sixth" element of the merits determination under section 13711(b)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold requirement needed to invoke section 13711. See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 13711(b)(2) to determine whether the carrier's undercharge collection effort is an unreasonable practice.

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by Be-Mac and paid by American. The consistent application in the original freight bills of discounted freight rates in the form of flat charges that in general conform with the September 26, 1991 rate proposal offered by Be-Mac, and a 55% percent reduction off a class rate, support the contentions of petitioner and reflect the existence of negotiated rates. The evidence further indicates that American relied on the agreed-upon rates in tendering its traffic to Be-Mac.

In exercising our jurisdiction under section 13711(b), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711((b)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 13711(b)(2)(E)].

Here, the evidence establishes that negotiated discount rates were offered to American by Be-Mac; that American reasonably relied on the offered discount rates in tendering its traffic to Be-Mac; that Be-Mac did not properly or timely file a tariff providing for such discount rates and has not entered into an agreement for contract carriage; that the negotiated rates were billed and collected by Be-Mac; and that Be-Mac now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Be-Mac to attempt to collect undercharges from American for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable David P. McDonald
United States Bankruptcy Court for
the Eastern District of Missouri, Eastern Division
211 North Broadway, 7th Floor
One Metropolitan Square
St. Louis, MO 63102

Re: Adv. No. 95-4115

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary